

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL.

Criminal Appeal No. 1148/2001

(Old No. 1946 of 1983)

1- Churha S/o Shama -(Since deceased)

2- Prem S/o Churha

3- Bal Mukand S/o Churha

4- Mahendra Pal S/o Churha

5- Pooran S/o Churha

6- Prakash S/o Churha

7- Narain Singh S/o Nanhe

8- Kesho Ram S/o Kanhaiya —(Since deceased).

9- Nanhe S/o Tulsi

-- Appellants.

All R/o village Dhakrani, P.S.

Vikash Nagar, Dehradun.

$$V_S$$

State

..Respondent.

Sri Vinod Sharma Advocate, learned counsel for the appellants.

Sri G.S. Sandhu learned A.G.A. for the state.

Date:20-12-2003

ORAL JUDGMENT (Per: Hon'ble Irshad Hussain, J.)

The appellants have been convicted and sentenced to undergo R.I. for one year under section 147 I.P.C. and R.I. for ten years each under section 304 I.P.C. read with section 149 I.P.C., per judgment dated 19-8-1983 passed by the then Additional Sessions Judge, Dehradun in Sessions Trial No. 35 of 1982.

2- The appellants Churha and Kesho Ram are since deceased, therefore, the appeal in regard to these two stand abated under section 394 of the Code of Criminal Procedure.

3- Briefly stated the facts of the case as emerged from the F.I.R. and the evidence were that Karan Singh took 'Dakhli-Rehan' (possessory-mortgage) of agricultural land having an area of three Bighas situate in his village Dhakrani, P.S. Vikash Nagar district, Dehradun, from Tulsi, the father of appellant Nanhe, about twelve years ago (from the date of the occurrence). This land was subject matter of litigation between Karan Singh and appellant Nanhe but according to the prosecution Karam Singh remained in actual physical possession of the same. On 27-10-1981 at about 1 p.m. all the appellants trespassed into the land while Karam Singh was ploughing it. A state of commotion attracted Karam Singh's brother Dharam Singh towards the said land besides co-villagers namely Raghu Ram, Sabshad, Ratan and Raja Ram. All these persons reached on the land where they found Karam Singh lying injured in an unconscious state. He was immediately shifted to government hospital in Vikash Nagar on a bullock-cart and since his condition was serious the medical officer referred him to Christian hospital for better management. The victim was admitted there in the evening of 27-10-1981 but he succumbed to injuries at about 6 p.m. on 28-10-1981. Informant, Dharam Singh (P.W.2) then got prepared written report (Ext. Ka.7) and lodged it at P.S. Vikash Nagar at 9.50 p.m. on its basis F.I.R. (Ext. Ka.8) under sections 147/304 I.P.C. was recorded and investigation was entrusted to S.I. Kishan Singh (P.W.5).

4- After completion of the initial formalities investigating officer left for Christian hospital and on reaching there held inquest on the dead body of Karam Singh and prepared inquest report (Ext.Ka.10) and relevant documents including the challan report and thereafter dispatched the dead body for post mortem. Dr. K.K. Singh (P.W.6) conducted autopsy on the dead body at 4 p.m. on 29-10-1981 and prepared autopsy report (Ext.Ka.4). On completion of the investigation, charge-sheet (Ext. Ka.20) was submitted against the appellants on 24-11-1981.

5- The appellants have pleaded not guilty to the charges and contended that they have been falsely implicated in the case on account of enmity. The appellant Churha (since deceased) claimed that he reached there at the scene after hearing the noise and was assaulted by Lathis by Karam Singh deceased. Bal Mukand gave out that quarrel took place between deceased Karam Singh, Nanhe, Dharam Singh, Raja Ram and Ram Swaroop and he had reached there

to pacify them but in the process was given a Lathi blow on the head by Dharam Singh. Appellant Puran made similar claim and sustaining of injuries at the hands of Ram Swaroop, Dharam Singh and Raja Ram. Appellant Mahendra Pal denied his presence at the scene of the incident and whereas appellant Om Prakash made similar assertion as made by Bal Mukand and Pooran. He also sustained injuries at the hands of Dharam Singh, Ram Swaroop and Raja Ram who wielded Lathis in the assault. Appellant Narain Singh is the son of Nanhe and claimed that due to this relationship he has been falsely implicated. Appellant Kesho Ram (since deceased) also denied his presence at the scene of the incident and whereas appellant Nanhe asserted that he got the possession of the land on 24-10-1981 and when deceased Karam Singh started ploughing of the land illegally on 27-10-1981 he went there and asked Karam Singh to refrain from ploughing the land. Appellant claimed that in turn he was assaulted by Karam Singh by a stick used for taming the bullocks. He also gave out that at that time Raja Ram, Dharam Singh and Ram Swaroop, the brothers of Karam Singh, were also there and they also assaulted him by wielding Dandas which has in fact also hit deceased Karam Singh on the head. At that point of time other appellants Pooran, Om Prakash, Bal Mukand and Churha (since deceased) have reached at the place of the occurrence and they were also assaulted by these persons. These appellants were then taken to the hospital for medical examination and a report was also lodged with the police.

6- It need to be pointed out here that in defence injury report of appellant Om Prakash and Zerox copies of the injury reports of appellants Bal Mukand, Pooran and Churha were filed on record. These reports are Ext. Kha. 1 to Kha.4 respectively on the record.

7. As per injury report, Ext. Kha-1, the following injuries were found on the person of appellant Om Prakash:-

1. Lacerated wound 'Y' shaped 7 cm x 1.5 cm x upto bone deep on middle of the scalp, 11cm above between the eye-brows. Fresh clotted blood smeared around wound, which bleeds on mopping.
2. Abrasion 2 cm x 1 cm on right fore-arm, 4cm below elbow joint. Clotted blood smeared around wound.
3. Contusion and abrasion 11 cm x 1.5 cm on ulna aspect of left fore-arm, extending from wrist joint to upwards. Colour of skin is reddish.
4. Contusions 4 cm x 3 cm on left upper arm posteriorly 3 cm below elbow. Colour of skin is reddish, swelling present.

5. Abrasion 4 cm x 1 cm on left right skin of tibia, 5 cm below knee joint. Fresh clotted blood smeared around wound.
 6. Abrasion 2 cm x 1.5 cm on left middle of leg, blood smeared around wound.
- 8- As per injury report, Ext. Kha.2, injuries found on the person of appellant Bal Mukand are as under:-
1. Lacerated wound 4 cm x 1.5 cm x bone deep on left side on scalp, on parietal region, 12 cm above left ear. Fresh clotted blood smeared.
 2. Contusion 4 cm x 2 cm horizontally placed on lateral side of deltoid upper end 2.5 cm below shoulder joint. Colour of skin reddish.
- 9- Ext. Ka.3, is the injury report of Pooran Singh, and injuries found were as below:-
- 1- Lacerated wound 4.5 cm x 1.5 cm x bone deep on left side of forehead vertically place, 5 cm above middle of the left eye-brow. Clotted freshs blood smeared around wound.
 - 2- Lacerated wound 6 cm x 1.5 cm x bone deep on middle of the forehead, 2 cm away and above injury no.1. Vertically placed 7 cm above medial end of left eye-brow. Fresh clotted blood smeared around wound.
 - 3- Contusion 5 cm x 5 cm on posterior surface of right elbow with swelling. Colour of skin is reddish. No bony deformity seen.
 - 4- Contusion 5 cm x 2 cm horizontally placed on right upper arm above elbow. Swelling present. Colour of skin is reddish. No body deformity seen.
 - 5- Abrasion 1.5 cm 1.5 cm on left skin of tibia, 8 cm below left knee Joint.
- 10- As per injury report Ext. Ka.4 following injuries were found on the person of Churha:
- 1- Contusion and abrasion 4 cm x 1 cm on posterior aspect of left fore-Arm, 3 cm below left elbow. Swelling present. Colour of skin reddish. Clotted blood smeared around wound.
 - 2- Contusion 3.5 cm x 2.5 cm on left scapular region, 5 cm posterior to the left axilla. Colour of skin reddish.
- 11- All these injured appellants were medically examined between 2.40 p.m. and 4.15 p.m on 27-10-1981 and as per the injury reports injuries of all these were fresh in duration and were caused by blunt object.
- 12- In defence carbon copy of the N.C.R. (Ext. Kha.6) and copy of the G.D. report no. 16 of 14.25 dated 27.10.1981 (Ext. Kha.5) were filed to show that

appellant Nanhe lodged report of the same incident at 2.25 p.m. on 27-10-1981 alleging that when he objected to ploughing of his land by (the accused namely) Karan Singh, Raja Ram, Dharam Singh and Ram Swaroop, they started giving abuses and assaulted Churha Ram, Puran Pal, Bal Mukand and Om Prakash by wielding Lathis and Dandas and caused them injuries. After registration of the F.I.R. these injured were sent for medical examination. The other documents filed in defence is the copy of the judgment of the Board of Revenue at Allahabad dated 27-9-1982 (Ext. Kha.7) in second appeal No. 1 of 1981-82 regarding dispute relating to plot No. 1152 area .60 acre which was given by Tulsi, the father of the appellant Nanhe to deceased Karam Singh in pursuance of a possessory mortgage deed dated 6.1.1975 against a loan of Rs. 4,00,000/-. The judgment shows that suit for possession on the basis of the redemption of the mortgage was decreed by the trial court and the judgment was upheld in appeal by the Additional Commissioner. The second appeal preferred before the Board of Revenue was also decided in favour of the mortgagor.

13- The other document is the certified copy of memo of delivery of possession or the 'Dakhalnama' dated 24.10.1981 (Ext. Kha-8) showing delivery of the possession of the plot to Nanhe (appellant) in the absence of opposite party Karam Singh who remained absent despite information to hand over possession.

14- So far as the evidence of the prosecution is concerned 6 witnesses were examined to prove the charges leveled against the appellants. Of these witnesses, P.W.1, Dr. S.C. Purohit is the medical officer who examined the injured Karam Singh at 3.50 p.m. on 27.10.1981 and prepared the injury report (Ext. Ka.1). The following injuries were found on the person of the said victim:

- 1-Lacerated wound with swelling on the left parietal region of scalp, 8cm x 2cm x bone deep, 13 cm above left ear. It was fresh and stream bleeding was present and clotted fresh blood smeared around the wound
- 2-Contusion 10 cm x 2.5 cm on posterior aspect deltoid region, Obliquely placed with reddish skin.

15- The injured as stated above was advised hospitalization in another hospital and the victim was therefore shifted to Christian hospital where he succumbed to the injuries next day at 6.10 p.m. the post mortem was performed by P.W.6, Dr. K.K.Singh who besides proving post mortem report

(Ext. Ka.4) also described the ante-mortem injuries and gave an opinion that cause of death was coma as a result of the head injury (corresponding to above injury No.1), about one day ago.

16- P.W.2, Dharam Singh is the informant of the case. He supported the prosecution case disclosed in the F.I.R. lodged by him. P.W.3, Samshad Ahmad and P.W.4, Ratan Lal are the two other eye witnesses of the occurrence and they narrated the prosecution version as disclosed above. P.W.5, S.I. Kishan Singh proved the investigation part of the case and relevant documents prepared by him including the charge-sheet. He attached blood-stained and prepared by him including the charge-sheet. He attached blood-stained and plain earth from the place of the incident vide memo, Ext. Ka.2. and also attached blood-stained clothes of the victim Karam Singh vide memo (Ext. Ka.3).

17- Prosecution also relied upon the documentary evidence which consists of certified copy of interim order dated 19-10-1982 (Ext. Ka. 17) passed by the Allahabad High Court in writ petition preferred by the legal heirs of deceased Karam Singh against the judgment in second appeal of the Board of Revenue dated 27-9-1982, copy of which as mentioned above has been filed by the appellants. By the interim order the opposite parties were restrained from interfering in the possession of the petitioners over the land in dispute. Ex.Ka.1 is the copy of the said application in the writ petition and whereas Ext. Ka.19 is the certified copy of the said writ petition No. 12247/1982. Copies of the judgment of the lower courts and the Board of Revenue have also been filed by the prosecution to show that deceased Karam Singh continued to be in possession of the land in dispute.

18- The learned trial court analysed the evidence on record and accepted the prosecution version on placing reliance on its evidence in the case while rejecting defence plea of self defence of property and person and property by observing that deceased Karam Singh was assaulted by the appellants while the deceased was ploughing the land in question and that the appellants have committed the offence of culpable homicide not amounting to murder in furtherance of their common object of the unlawful assembly. The appellants were accordingly held guilty and convicted as aforesaid.

19- I have the learned counsel for both the parties and have carefully scrutinized the evidence on record with the help of both the learned counsel and have also perused the judgment under appeal.

20- As is evident from the defence taken an incident took place at about 1 p.m. on 27-10-1981 in plot Khasra No. 1152 area 0.60 acre when deceased Karam Singh started ploughing it and appellant Nanhe went there to refrain him from doing so as the appellant had been claiming his actual physical possession over it since 24-10-1981 after he succeeded in litigation relating to the said land. In the face of the facts of the case and to know the correct state of affairs the crucial question was as to which of the two was in fact in actual physical possession of the land on the date of the incident. Learned Sessions Judge on the basis of his appreciation of the evidence rejected the defence contention of delivery of possession of the land to appellant Nanhe on 24-10-1981. Learned counsel for the appellants submitted that the view taken by the learned Sessions Judge was based on mis-reading of the evidence and in ignorance of the correct facts about the pending litigation between Karam Singh and Nanhe and the out-come of the same in favour of the appellant Nanhe and consequent execution in terms of delivery of possession to him by the concerned court Amin on 24-10-1981, vide memo of delivery of possession (Ext. Kha.8). Having considered the evidence in the light of the argument I find no substance in it and the conclusion arrived at by the learned Sessions Judge in this regard was not unwarranted.

21- The reason for the above inference is that in the suit filed under section 229-B/209 of U.P. Zamindari Abolition and Land Reforms Act, 1951 by appellant Nanhe was decided per judgment dated 9-10-1979 (Annexure of Ext. Ka.19) and the said appellant Nanhe was held entitled to get possession of the land after ejection of deceased Karam Singh on payment of amount of loan of Rs. 4,000/- to said Karam Singh but no evidence was adduced to show that the said requirement of payment of Rs. 4000/- was complied with by the appellant Nanhe. Further, the said judgment of Assistant Collector Ist class, Dehradun although was affirmed in first appeal as well as in the second appeal before the Board of Revenue at Allahabad as stated in the earlier part of the judgment, the execution of the decree could very well have been effected only on compliance of the above condition of payment of Rs. 4000/-. Since there was nothing to show that the payment had been made by the appellant Nanhe to deceased Karam Singh the memo of delivery of possession (Ext. Kha.8) only turns out to be a mere paper transaction and in fact actual physical possession had not been delivered to appellant Nanhe by eviction of deceased Karam Singh from the said land. Therefore, the deceased Karam Singh despite the decisions of the

revenue courts against him continued to be in actual physical possession and was in possession there-on also on 27-10-1981. On that day at about 1 p.m. he went to plough the same and at that time the appellant Nanhe went there to cause hinderance in the said work under-taken by deceased Karma Singh. In a situation like this the learned Sessions Judge was also fully justified in coming to the conclusion that the plea of self defence of person and property has not been established by preponderance of probabilities. In fact the appellant Nanhe went there to restrain deceased Karam Singh from ploughing the land and in the process the assault was made on the person of the deceased.

22- According to the prosecution all the nine appellants armed with Lathi-Dandas have reached the scene of the incident and assaulted the victim deceased Karam Singh when they wanted to stop the said victim from ploughing the land. Learned counsel for the appellants argued that the evidence on record failed to prove the said allegation and rather it was shown that the persons who have collected at the scene of the incident to intervene in the dispute and pacify the deceased Karam Singh and Nanhe were badly assaulted and caused injuries. The persons so injured were the appellants Om Prakash, B Mukand, Puran Pal and Churha and the learned counsel submitted that injuries of these persons having not been explained indicate that the prosecution has suppressed the genesis of the occurrence and therefore the prosecution version was required to be discarded by the learned trial Judge and that in not doing so injustice has been done to the appellants. Considering the totality of the circumstances of the case and the evidence adduced by the prosecution there was, however, need to carefully scrutinize the evidence in order to separate the chaff from the grain so that only the real culprits were to be held responsible for commission of the crime. As is obvious the deceased Karam Singh sustained only one fatal lacerated wound on the head as a result of which his death was caused. When prosecution alleged that as many as nine persons wielded their Lathi-Dandas in making assault on the said victim the presence of only one such fatal injury and another simple injury in the form of a contusion on one of the hand warranted above approach and it can be said without hesitation that the learned trial Judge failed to probe the evidence, the facts and circumstances of the case in this perspective and went on to place implicit reliance on the prosecution claim regarding the involvement of all the nine alleged assailants.

23- In view of above there being legal requirement to re-appraise the evidence of the prosecution it need to be mentioned at the out-set that all the three witness of the fact namely Dharam Singh (P.W.2), Samshad (P.W.3) and Ratan Lal (P.W.4) gave out that deceased Karam Singh was assaulted by appellants Nanhe and Pooran only and these assailants wielded Lathis against the sad victim. All the three witnesses have been consistent in regard to the role assigned to these tow appellants only and there can be no gain saying that the presence of only two injuries on the person of the deceased Karam Singh also support their version to that extent only. By no reasoning it could safely be accepted that deceased Karam Singh was to sustain only one fatal injury if as many as nine assailants were to wield their Lathi-Dandas against him in the occurrence and particularly when the said victim himself was not armed but was possessed of only a stick used for taming the bullocks of the plough. Here it shall also be useful to mention that all the three witnesses of the prosecution also gave out that the disputed plot of land is situate within the residential locality of the village. This is also evidenced by the site-plan (Ext.Ka.13) prepared by the investigating officer. In a situation like this it was not un-usual for the relations of both the deceased Karam Singh and the appellants Nanhe and Pooran to reach there at the plot on hearing the noise and in a mayhem the relations of the victim Karam Singh indulged in manhandling the relations of the two assailants and in the process causing them some injuries. Therefore those other relations of the appellants Nanhe and Pooran who also appeared at the plot after the actual incident of assault of deceased Karam Singh could not have been attributed common object or such a thing having activated all of them to join in furtherance of the object either before arrival or during the course of subsequent events to the actual occurrence. Therefore, the appellants other than Nanhe and Pooran could not have been held responsible for committing the offence of rioting punishable under section 147 I.P.C. and further they could not have been held responsible for fatal assault on the person of deceased Karam. Consequently the appellants other than Nanhe and Pooran could not have been adjudged as the guilty also with reference to the death of the victim on their reaching or appearing at the plot after the actual assault had been made on the victim and they can not be attributed any common object with reference to the death of the said victim. Therefore the appellants Nanhe and Pooran alone should have been held liable for the homicidal death of Karam Singh. In the face of the facts of the case and the

clear and cogent evidence of the three witnesses of the fact that only appellants Nanhe and Pooran assaulted the victim Karam Singh, the injuries sustained by the four appellants also stand sufficiently explained by the attending facts and circumstances of the case.

24- In the instant case the learned trial Judge has convicted the appellants under section 304 I.P.C. read with section 149 I.P.C. Since it has been held that the appellants have not formed an unlawful assembly with a common object and that only the appellants Nanhe and Pooran have assaulted the victim Karam Singh, the absence of charge under section 34 I.P.C. against these two appellants would not make any difference because on the proved facts and the evidence available on record, their intention to commit an offence has been established. Failure to charge these two appellants under section 34 I.P.C., who stood charged under section 149 I.P.C. would not result in any prejudice to them (see **Dalip Singh Vs. State of Punjab; 1954 S.C.R. 145**). Therefore these two appellants Nanhe and Pooran can be convicted for the major offence read with section 34 of the Indian Penal Code.

25- The learned trial Judge has not given any reasoning as to under which part, that is, either Part-I or Part-II of section 304 of the Indian Penal Code the case of the assailants fall. Only one fatal blow of blunt weapon was sustained by the victim Karam Singh and I am of the view that the blow was not aimed to cause his death or with any positive intention to make it fatal for the said victim and therefore the case would also not fall under clause “thirdly” of section 300 I.P.C. and both the appellants Nanhe and Pooran could have been held guilty of the offence punishable under Part-II of section 304 I.P.C. However in the peculiar facts and circumstances of the case sentence of ten years R.I. as imposed by the learned trial Judge appear just and proper and the same does not warrant any interference.

26- For the reasons aforesaid the appeal is partly allowed. Appellants Bal Mukand, Prakash, Prem, Mahindra Pal, and Narain Singh are held not guilty and acquitted of the charges under section 147 I.P.C. and section 304 I.P.C. read with section 149 I.P.C. They need not surrender. Their bail bonds are cancelled and sureties discharged. Appeal against other two appellants Churha and Kesho Ram (since deceased) stand abated as mentioned earlier.

27. Appellants Nanhe and Pooran are acquitted of the charge under section 147 I.P.C. Their conviction and sentence for 10(ten) years R.I. each under section 304 I.P.C. read with section 149 I.P.C. is altered and modified to

section 304 Part-II I.P.C. read with section 34 I.P.C. They shall be taken in to custody and sent to jail to serve out the sentence.

28- Let the record of the case be sent to the court concerned for compliance. The compliance report is submitted within one month.

(Irshad Hussain, J.)

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